Reserved Judgment

THE HIGH COURT OF UTTARAKHAND AT NAINTIAL.

Writ Petition No. 546 of 2002 (M/S)

1. Shyam Lal
2. Jogendra,
3. Girwar Singh,
4. Kabul Singh,
5. Charan Singh, all sons of late Sri Tarif,
   R/o Village Nasipur Kalan,
   Pargans Jwalaur, Tahsil and
   District Haridwar.

.....Petitioner.

Versus

Smt. Premo W/o Babul Ram, D/O Late Surta,
R/O village Mirza Tilla, k Tahsil Jansath,
District Muzaffarnagar. **.....** **Respondents**

Mr. Lokpal Singh, learned counsel for the petitioners.
Mr. A.K. Sharma, learned counsel for the respondent.

Dated December 24, 2004

Hon'ble B.S. Verma, J.

By means of this writ petition, the petitioners have challenged the order dated 10-05-2001, passed by Assistant Settlement Officer (Consolidation) Roorkee, Annexure-9 to the Writ petition, and judgment and order, dated 10-7-2002 Annexure - 10, passed by Deputy Director of Consolidation Roorkee (Haridwar) and prayed for quashing the impugned orders.

Facts given rise to the petition are that the appeal filed by Smt. Premo, respondent, against the order dated 11.01-1996 was dismissed in default on 10-12-1997 by Assistant Settlement Officer (Consolidation) Roorkee. Smt. Premo filed restoration application on 12.07.1999 along with an application under Section 5 of the Limitation Act. The application was allowed by the impugned order, dated 10.05.2001 (***Annexure-9)*** by the Assistant Settlement *Officer* (Consolidation) Roorkee on the ground that in the Consolidation Court, that rights of the parties have to be decided

finally and no written objection has been filed by the Opposite Parties and the application was not opposed even orally hence the Assistant Settlement Officer (Consolidation) restored the appeal to its original number and recalled the order dated 10.12.1997 and ordered to hear the appeal on merits. Aggrieved by the order dated 10.05.2001, passed by Assistant Settlement Officer (Consolidation), the petitioners have filed the Revision No. 412 of 2001 under Section 48 of the Consolidation/ of Holding Act before the Deputy Director of Consolidation/ Collector Haridwar. The Deputy Director (consolidation)/Collector Haridwar heard the revision and has also given a categorical finding that the Assistant Consolidation Officer has set aside the ex-parte order, dated 10.12.1997 by his order dated 10.5.2001 and he has also observed that rights of the parties have not been taken away for hearing. Even otherwise, he has ordered to rehear the appeal on merits and the order being interim, therefore, he revision is not maintainable and the D.D.C. by his order dated 10.07.2002 dismissed the revision filed by the petitioners. Aggrieved by both the impugned orders, the petitioners have filed the present writ petition.

The present writ petition has been field inter-alia on the ground that the property in dispute was recoded in the name of one Nasibulla son of Gulamnavi as Bhumidhar with transferable right. The name of aforesaid Nasibulla was wrongly recoded in the revenue records. The father of the petitioner and his brother Surta filed a suit against aforesaid Nasibulla under Section 229 B of the U.P.Z.A. and L.R. Act. The suit was decreed by Sub Divisional Officer Roorkee; but the name of Nasibulla could not be deleted from the revenue records, hence the petitioner filed objection before the Assistant Consolidation Officer under Section 9-A of the Act. Finally, the Consolidation Officer Roorkee by his order dated 11.1.1996 allowed the objections and the name of Nasibulla has been deleted from the revenue records on the basis of earlier order dated 10.07.1957 and the name of Smt. Premo, daughter of Surta, the respondent, and Sri Shyam Lal, Jogendras, Girwar Singh, Kabul

Singh and Charan Singh, the petitioners have been recorded in Khata No. 124. Regarding the shares, Consolidation Officer also ordered that these persons shall have equal shares in the Khata, except those numbers which are out of consideration. Aggrieved by the order dated 11.1.1996 passed by Consolidation Officer, respondent Smt. Premo preferred Appeal No. 556 of 96-97, Premo Vs. Shyam Lal and others, before Settlement Officer Consolidation.

Father of the respondent and father of the petitioners were real brothers. Sri Surta Died in 1976 and Tarif, father of the petitioners, has also died in the year 1997. The marriage of Smt. Premo was solemnized before the death of her father and she had got no right in the land in dispute. After the death of Surta, father of the petitioners became the absolute owner of the land in dispute and the petitioners alleged that there was no share of Smt. Premo in the land in dispute; but the petitioners agreed to give her 1/6th Share in the land in dispute by mutual family settlement and she also agreed to take the share in the disputed land by way of family settlement with the petitioners and she also gave her consent before the Settlement Officer Consolidation regarding 1/6th share; but when she got 1/6th share in the land in dispute, then she was driven by greed and then she filed an appeal challenging the order dated 11.1.1996 passed by Settlement Officer Consolidation. It is pertinent to mention here that there was no reference of alleged compromise in the order of the Consolidation Officer. The petitioners have also alleged that in terms of alleged compromise, the respondent had also moved an application to withdraw the appeal filed by her; but no order had been passed thereon and moreover, in terms of the compromise, petitioners have also executed a sale deed in favour of the respondent a part of land. The appeal was ultimately dismissed by the Settlement Officer Consolidation, Roorkee, for want of prosecution, vide his order dated 10.12.1997. Subsequently, to recall the aforesaid order, restoration application had been filed by the respondent on 12.7.99 along with an application for condonation of delay. The petitioners have also

alleged that the Settlement Officer Consolidation wrongly restored the case without sufficient cause by his Order dated 10.05.2001 against which the petitioners preferred Revision No. 412 of 2001 under Section 48 of the Consolidation of Holdings Act, which too was rejected by the Deputy Director of Consolidation by his order dated 10.07.2002. As mentioned earlier, against that order the present petition, on the abovementioned grounds, had been field.

Counter-affidavit had been filed on behalf of the respondent Premo and she has denied the averments made in the Writ Petition. In paragraph 15 of the Counter Affidavit, she has stated that the compromise dated 10.12.1996 was never acted upon and the appeal was dismissed in default on 10.12.1997. She has also moved an application on 10.05.2001 before the Consolidation Officer, which is Annexure-CA-1 to the Counter Affidavit praying therein that she does not want to compromise and the appeal may be heard on merits. It has also been mentioned in the Counter affidavit that no objection has been filed by the petitioners against the restoration application and no sale deed has been executed in terms of the compromise. The sale deed, executed by the petitioners in favour of the respondent, is a separate documents and the same is not a consequence of the alleged compromise and in para 16 of the Counter Affidavit, the respondent has specifically stated that after moving restoration application, the petitioners had been present on several dates, fixed for hearing of the restoration application; but no objection had been filed and in support of her contention, photocopy of the ordersheet dated 7.3.2001 has been annexed as CA-2 to the Counter Affidavit and the respondent further alleged that the order passed by the Settlement Officer Consolidation. is an interim in nature, therefore, it has been rightly rejected by the Deputy Director of Consolidation and no revision lay against it.

The petitioners have filed rejoinder affidavit denying the contention of the respondent and have reiterated the averments made in the Writ Petition.

The main submission of the learned counsel for the petitioners is that the respondent has moved the application that she does not prosecute the appeal in terms of compromise and she has also stated that the share decided by the Consolidation Officer, vide his order dated 11.1.1996 be maintained and the said application has been presented by the respondent Smt. Premo, indentified by Sri Azad Singh Advocate. In reply thereto, the learned counsel for the respondent submitted that she withdrew the aforesaid application on 26.11.1996 by moving an application on 10.05.2001. It is admitted to both the parties that no order in appeal was passed on the basis of the application moved by the respondent; rather the appeal was dismissed in default for non-prosecution on 10.12.1997, which was restored on the basis of restoration application moved by the respondent.

The only question for consideration before this Court, which is under challenge, is whether the order dated 10.5.2001, by which the restoration application was allowed and whether the order dated 10.07.2002, whereby the Deputy Director of Consolidation dismissed the revision of the petitioners require any interference? Other grounds of challenge are not relevant to be decided in the present writ petition.

By the impugned order, dated 10.05.2001, Annexure-9 to the Writ petition, Assistant Consolidation Officer Roorkee restored the appeal on the ground that in the consolidation Court, the rights of the parties have to be decided finally and no written objection has been filed by the Opposite Party and even the application was not opposed orally. Deputy Director of Consolidation confirmed the order passed by Settlement Officer Consolidation holding that the order passed by the Settlement Officer Consolidation is interim in nature and he gave a categorical finding that the rights of the parties have not been taken away for hearing and even otherwise he has ordered to rehear the appeal on merits. It is noteworthy to mention

here that the application to withdraw the appeal and the second application to withdraw the earlier application dated 26.11.1996 are still pending before the Settlement Officer Consolidation for decision. The Settlement Officer Consolidation has not passed any order on the said applications. The validity of compromise has to be seen by him. When the appeal is heard on merit, the petitioner has a rights to raise the plea of estoppel and validity of compromise is yet to be seen. No prejudice shall be caused if the case if hears on merit.

Under Article 227 of the Constitution, jurisdiction is supervisory and has to be exercised for keeping the subordinate courts within the bounds of their jurisdictions. When a subordinate court has assumed a jurisdiction, which it does not have or has failed to exercise is its jurisdiction, which it does have or the jurisdiction though available is being exercised by the Court in a manner not permitted by law and failure of justice or grave injustice has occasioned, then only the High Court may step into supervisory jurisdiction and in a writ certiorari or in exercise of supervisory jurisdiction, none is available to correct mere errors of facts or of law, unless the following requirements are satisfied as held by the Hon'ble Apex Court in Surydeo Rai Vs. Ram Chandra Rai [(2003) 6 SCC 675 and subsequently in "Ranjeet Singh Vs. Ravi Prakash [(2004) 3 S.C.C. page 682.]

(i) error is manifest and apparent on face of record, and (ii) grave injustice or gross failure of justice has been occasioned thereby.

It has been observed by the Apex Court in the case of Surya Dev Rai (supra) that "On the other hand, supervisory jurisdiction under Article 227 of the Constitution is exercised for keeping the subordinate court within the bounds of their jurisdiction. When a subordinate court has assumed a jurisdiction which it does not have or has failed to exercise a jurisdiction which it does not have or the jurisdiction though available is being exercised

by the court in a manner not permitted by law and failure of justice or grave injustice has occasioned thereby, the High Court may step in to exercise its supervisory jurisdiction." In the latter case, the Apex Court has observed inter alia in paragraph 4 of the judgment that "An error which needs to be established by lengthy and complicated arguments or by indulging in a ling-drawn process of reasoning, cannot possible be an error available for correction by writ of certiorari. If it is reasonably possible to from two opinions on the same material, the finding arrived at one way or the other, cannot be called a patent error. As to the exercise or supervisory jurisdiction of the High Court under Article 227 of the Constitution also, it has been held in Surya Dev Rai that the jurisdiction was not available to be exercised for indulging in reappreciation or evaluation of evidence or correcting the errors in drawing inferences like a court of appeal."

In the present case the Settlement Officer Consolidation has set aside the ex-parte order on the application moved by the respondent. The appeal has to be heard on merits and the SOC has the jurisdiction to set aside the ex-parte order and he can hear the appeal on merits. Deputy Director of Consolidation has also confirmed the said order.

The petitioners have raised a ground that by way of alleged compromise, the share was agreed and the application has been moved by the respondent before Settlement Officer Consolidation, which was subsequently withdrawn by moving an application by the respondent. No further order has been passed by the Settlement Officer of Consolidation on this application and he dismissed the appeal in default. By the impugned order, the appeal has been restored to its original number. No grave injustice was caused to the petitioners. Moreover, the question of share of the parties cannot be reduced or increased on mere statement. Question of share is a legal question. It is the duty of the Court to decide the same. The consolidation proceedings are settlement proceedings.

The Consolidation Officer has not framed any issue as to what are the shares of the petitioners and respondents in the disputed land. He only mentioned the share of the parties in the operative portion that share be recorded equally. That order has been challenged by the respondents before the Settlement Officer Consolidation under appeal.

The learned counsel for the petitioners has relied on the following cases:

1. **"Nagubai Ammal and others V.B. Sharma Rao and others" (1956 Supreme Court, page 593),**

2. "N.A. Mohammed Kasin (dead) by LRs. And another Vs. Sulochana and others" [1995 Supp (3) S.C.C., 128]

3. "Rohan Singh Vs. The Deputy Director of Consolidation, Mathura and others [1980, A.W.C., page 663]

4. "Bans Bahadur Singh and others Vs. Dy. Director of Consolidation and others" [1993, R.D., page 249].

Relying upon the case of **Nagubai Ammal (supra),** learned counsel for the petitioner argued that the respondent had moved an application to withdraw the appeal and admitted the share of the appellant, therefore, it should be presumed to be true. The learned counsel further argued that the respondent was estopped by her pleadings and the maxim of approbate and reprobate. It is true that a party cannot, after taking advantage under an order be heard to say that it is invalid and ask to set it aside, or to set up to the prejudice of persons who have relied upon it a case inconsistent with that upon which it was founded; nor will he be allowed to go behind an order made in ignorance of the true facts to the prejudice of third parties, who have acted on it. In the instant case, neither the compromise application was accepted, nor any order was passed on the basis of the alleged compromise application. The compromise application was admittedly moved on 26-11-1996 but no order was passed thereon as late as on 10-5-1997, when the respondent Smt.

Premo moved application with a prayer that she dose not want to compromise the case and the case be head on merits. Even the appeal was dismissed in default on 10-12-1997. it is thus clear that the alleged compromise was never accepted or acted upon. The principle of approbate and reprobate does not apply to the instant case. It is pertinent to mention here that the respondent had subsequently moved another application on 10-5-2001 to withdraw the application dated 26-11-1996 before the Settlement Officer Consolidation, which was annexed along with the Counter Affidavit as Annexure C.A-I. In the said case itself, the Apex Court has held in para 18 that ***"an admission is not conclusive as to the truth of the matters stated therein. It is only a piece of evidence, the weight to be attached to which must depend on the circumstances under which it is made. It can be shown to be erroneous or untrue, so long as the person to whom it was made has not acted upon it to his detriment, when it might become conclusive by way of estoppel."*** In the present case, there is no question of estoppel as the respondent admittedly got title by succession in the land in question from her father and the petitioner's father Sri Tarif and father of the respondent Sri Surta were real brothers.

Learned counsel for the petitioners further submitted that the respondent entered into a compromise and she admitted the share of the plaintiff as well as heirs and doctrine of the estoppel and promissory estoppel will apply. She had no right to withdraw the application or her statement made in the application dated 26-11-1996. In support of this contention, the learned counsel has placed reliance in the case of **N.A.Mohammed Kasin (dead) by LRs (supra)**. Learned counsel for the petitioners further argued that the respondent had entered into a compromise before the Settlement Officer Consolidation and the compromise application was taken on record and no fraud was established in view of the judgment in the case **1980, A.W.C., page 663 (supra)**. In the said case, the parties entered in a lawful compromise and the dispute before the Consolidation Authorities was regarding the allotment of chaks and

while dealing Section 19 (e) of the U.P. Consolidation of Holdings Act and scope of compromise, the Allahabad High Court has held in para 8 that ***"Section 19(e) lays down that as far as possible every tenure-holder be allotted a compact area at the place where he holds the largest part of his holding. In a case of compromise between the parties, leading to a contrary situation, it cannot be said that, though, it was possible, but the allotment was not made at the place where the tenure-holder held that largest part of his holding. The compromise lawfully entered into between the parties, would certainly from a valid basis of departure from the normal rule under Section 19(e) of the Act. As such, a compromise cannot be said to be forbidden by law or a nature that, it permitted, it would default the provision of any law. It is always open to the parties to lawfully agree to an arrangement between themselves in relation to adjustment of chaks. The Act itself contemplates conciliation between the parties."***

In the present case, there is dispute of shares between the parties and that is a legal question and the same does not fall within the ambit of Section 19(e) of the Consolidation of Holdings Act, 1954. It is significant to mention here that the Settlement Officer Consolidation has not decided the share of the parties in the body of the judgment as has been mentioned earlier.

Lastly the learned counsel for the petitioners relying upon the ruling in the case of ***Bans Bahadur Singh and others Vs. Dy. Director of Consolidation and others (supra)*** submitted that compromise decree creates an estoppel by judgment. In the said case, the suit was decreed on the basis of a compromise by the Settlement Authority, but in the instant case, no such decree was passed by the Settlement Officer Consolidation, rather the compromise application dated 11.12.1996 was never acted upon by the Court and the appeal was dismissed on 10-12-1997 in default, as submitted by the learned counsel for the respondent. In any view of the matter, the rulings referred to above by the learned counsel for

the petitioner are of no avail to the petitioner. As mentioned earlier, the appeal has to be heard on merits and the Settlement Officer Consolidation has the jurisdiction to set aside the ex-parte order and he can hear the appeal on merit. As already observed above, the validity of compromise has to be seen by him. When the appeal is heard on merit, the petitioners have a right to raise the plea of estoppel and validity of compromise is yet to be seen. No prejudice shall be caused if the case is heard on merit. The Deputy Director of Consolidation has rightly confirmed the order of Settlement Officer Consolidation.

Learned counsel for the petitioners also argued that the marriage of Smt. Premo was solemnised before the death of her father, Surta, and she had got no right in the land in dispute. After the death of Surta, father of the petitioners became the absolute owner of the land in dispute and Smt. Premo had no share in the land in dispute. The arguments is misconceived because in order of succession as provided number Section 171 of Z.A. and L.R. Act, the married daughters have preference over the brothers.

In the result, it is not a case of interference under Article 227 of the Constitution and the petition is liable to be dismissed. It is made clear that while deciding the appeal on merit, the Assistant Settlement Officer (Consolidation) Roorkee shall not be influenced by the observations made by this Court in the body of the judgment.

With the above observations, the Writ petition is dismissed. No order as to costs.

Interim Order dated 26-7-2002 is vacated.

(B.S. Verma, J.)

RCP